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No. 94-176

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

TELELECT, INC.,

Petitioner,

vs.

KENNETH EARL FENSTERMACHER,

Respondent.

TELELECT, INC'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

Petitioner, Simon-Telelect, Inc. ("Telelect"), submits this reply brief in support of its petition for a writ of certiorari to the United States Court of Appeals for the Tenth Judicial Circuit.

STATEMENT OF THE CASE

Contrary to plaintiff's false accusations that Telelect misstated the record, the only material difference between Telelect's and plaintiff's statements of the case is whether the three KPL linemen "saw" the accident. The difference is wholly semantic, however, and the parties actually are in agreement.[1]

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[1] Plaintiff also falsely accuses Telelect of misstating KPL's original conclusions as to who was at fault. Telelect stated that KPL placed the blame for the accident squarely on plaintiff himself. (Pet. at 8-9.) Plaintiff asserts that KPL concluded that the design of the bucket truck's boom was defective. (Br. in Opp. at 6.) In exhibit 452, on which plaintiff relies, KPL's investigative committee concluded:

> The committee, in reviewing this incident feel that it occured [sic] due to human error. The employee, while working in the primary area did not observe all applicable safety rules. He did not have on his protective gloves. This is a lapse in judgement by the individual. . . . This is what ultimately led to his contact of both the neutral and energized controls.

The committee's recommendation to modify the boom was just an additional safety measure. As Telelect stated in the petition, KPL assigned *all* fault to plaintiff himself.

Plaintiff correctly states that the linemen observed plaintiff shortly *before* and immediately *after* the electrical circuit was completed. (Br. in Opp. at 4, 5.) Plaintiffs specifically concede, however, that how the live line came into contact with the boom of the bucket truck "was not observed by these same witnesses on the day of the accident." (Br. in Opp. at 23.) Plaintiffs concede this point because all of the linemen testified that on the day of the accident they did not see how the line and the boom came into contact.[2] Thus, the linemen did not observe whether plaintiff negligently maneuvered the boom into contact with the live wire (as Telelect argued, based on KPL's own investigation), or whether the live wire rose and touched the underside of the boom (as plaintiff argued, based on the reenactment). It is precisely this lack of knowledge that is the basis for Telelect's second Question Presented.

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[2] Crew Foreman Howard Kenworthy testified, "I can't say that that is what happened that day because I didn't see it that day." (10th Cir. Aplt. App. at 406.) Lineman Dennis Randel was asked, "You didn't see it that day, but when you repositioned the structure, released the tension on the neutral, it affected the east phase?" He responded, "Right. And then we were able to figure it out." (*Id.* at 371.) Lineman Keith Ahlvers testified to similar effect. (*Id.* at 317.)

REPLY IN SUPPORT OF REASONS FOR GRANTING THE WRIT

I.

A. TELELECT PROPERLY PRESERVED FOR APPEAL ITS FIRST QUESTION PRESENTED.

Plaintiff asserts that Telelect failed to raise in either of the courts below its argument that it had a due process right to cross-examine plaintiff's witnesses to show their employer's financial stake in the outcome of the case. (Br. in Opp. at 8-9.) Plaintiff apparently has failed to examine the record with sufficient care, for Telelect actually raised the issue in both the district court and the court of appeals.

Telelect cited to the district court[3] *Davis v. Alaska*, 415 U.S. 308 (1974), one of the two Sixth Amendment cases on which Telelect relies in its petition for certiorari. *Davis* relied heavily on *Greene v. McElroy*, 360 U.S. 474 (1959), a civil case that raised, but did not decide, the issue of whether there is a Fifth Amendment right to cross-examine to expose bias or interest. This citation of the leading case in the area was ample to raise the constitutional issue in the district court. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988); *Smith v. Goguen*, 415 U.S. 566, 576-577 & n.20 (1974). *See also Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1165 n.20 (10th Cir. 1989) (issue

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[3] Defendant's Reply Brief in Support of Its Motion for Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial, at 9-10.

properly preserved when raised for the first time in a motion for new trial, and then only in general terms).[4]

Telelect briefed the issue more thoroughly on appeal. Citing *United States v. Abel*, 469 U.S. 45, 52 (1984), Telelect argued to the Tenth Circuit that "[c]ross-examination of a witness to show bias is a fundamental right." (10th Cir. Opening Br. at 36.) Telelect also cited both *Davis* and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) in its reply brief. (10th Cir. Reply Br. at 22.) Acknowledging that both were criminal cases, Telelect argued:

> This fundamental right of cross-examination to show bias or interest applies in civil cases as well as criminal cases. As the Nevada Supreme Court held recently, "Although *Van Arsdall* is a criminal case which has stronger constitutional safeguards regarding cross-examination, the same reasoning regarding bias applies in a civil trial." *Robinson v. G.G.C. Inc.*, 107 Nev. 135, 808 P.2d 522, 527 (1991).

(*Id.*) In sum, Telelect properly preserved for review its first Question Presented.

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[4] Although still without merit, plaintiff's preservation arguments might make more sense if this petition involved review of a state court decision, as to which this Court lacks jurisdiction unless a constitutional "right, privilege, or immunity is specially set up or claimed" in the state court. 28 U.S.C. § 1257(a). *Cf.* Supreme Court Rule 14.1(h). This petition, however, is for certiorari to a United States court of appeals, as to which this Court may exercise plenary review. 28 U.S.C. § 1254(1). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) at 40.

B. PLAINTIFF'S BRIEF IN OPPOSITION CONFIRMS THAT TELELECT HAS RAISED A SERIOUS AND SUBSTANTIAL ISSUE THAT MERITS RESOLUTION BY THIS COURT.

Plaintiff acknowledges that Telelect was completely barred from revealing to the jury that KPL stood to recoup some $2.3 million if plaintiff won the case and plaintiff and KPL were found blameless. Plaintiff seeks to justify this result by arguing that Telelect was permitted to show other, unrelated forms of bias, such as the witnesses' personal friendship with the plaintiff and participation in "social activities" with the plaintiff. (Br. in Opp. at 15.)

Regardless of how it is ultimately resolved, Telelect has raised a significant issue: should a civil litigant be permitted to portray key witnesses as neutral and unbiased (except for their obvious sympathy for a friend and co-worker), while the opposing party is prohibited by court order from exposing their motive to lie? Plaintiff argues that he should be allowed to do so and to collect millions of dollars from Telelect when the jury is deceived by this masquerade. Telelect disagrees. Regardless of how this issue is resolved, it has far-reaching implications for ensuring fair trials in civil litigation. It is an issue worthy of resolution by this Court.[5]

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[5] Plaintiff argues that Telelect has not identified a conflict among the circuits. Of course, such a conflict is not a prerequisite to review by this Court. "[A]n important problem under the Federal Rules of Civil Procedure" presents sufficient grounds for certiorari. *Hickman v. Taylor*, 329 U.S. 495, 497 (1947). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) at 221 (citing *Hickman*). Telelect's petition identifies an issue of broad

(continued...)

Plaintiff's arguments in support of the district court's ruling only serve to buttress Telelect's position. Plaintiff argues that Telelect was permitted to show that each witness was instructed to cooperate with plaintiff's counsel. (Br. in Opp. at 15.) However, each witness claimed he was instructed to cooperate not only with *plaintiff's* counsel, but with counsel for *both sides*.[6] Thus, this attempted impeachment became just another opportunity for the KPL witnesses to represent themselves, falsely, as neutral and impartial. Far from providing a satisfactory substitute for the prohibited impeachment, this testimony only aggravated the prejudice to Telelect.

Plaintiff next argues that Telelect should be satisfied with the redacted form of the Restitution Memo, which contained the statement that KPL was cooperating with plaintiff's counsel. (Br. in Opp. at 16.) On the contrary, mere cooperation with plaintiff's counsel would seem to the jury natural and innocent. Plaintiff was injured on the job, and it was to be expected that his former employer would render normal cooperation in his lawsuit. Normal cooperation does not provide a motive to lie, however, and

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[5](...continued)
application on which this Court has not spoken, and which led to a serious injustice in this case. This is sufficient grounds for certiorari.

[6] For example, Clark Blodgett, KPL's Director of Safety and Training, testified that "we were told to cooperate with every interested party." (10th Cir. Aplt. App. at 427.) Howard Kenworthy, the foreman of plaintiff's crew, testified that "[w]e were supposed to cooperate with anyone that came around that had anything to do with the accident." (*Id.* at 403.) Telelect's counsel pressed, "Anyone representing Mr. Fenstermacher?" Kenworthy answered firmly, "Just anybody." Lineman Keith Ahlvers testified [illegible] (10th Cir. Aplt. Supp. App. at 17-18.)

the jury would have accepted these witnesses' testimony without suspicion. Only if the jury were informed of the *reason* that KPL was cooperating with plaintiff would they have realized that KPL's employees had strong motives to mold their testimony to fit plaintiff's case. *See Davis*, 415 U.S. at 318 (reversing trial court's limits on cross-examination where "counsel was unable to make a record from which to argue *why* [the witness] might have been biased") (emphasis in original); *United States v. Abel*, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony").[7]

In *Pointer v. Texas*, 380 U.S. 400 (1965), the Supreme Court held that the confrontation clause of the Sixth Amendment applies to the States through the Fourteenth Amendment. In so holding, the Court emphasized the importance of cross-examination to a fair trial:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair

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[7] Telelect does not argue that the district court lacks all power to restrict or control a civil litigant's cross-examination concerning bias or interest. After a party has been permitted to demonstrate the facts creating the particular area of impeachment, the trial court may limit further examination in that area to avoid "waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The district court may not, however, bar a party entirely from establishing the facts that reveal the witness's motive to lie.

> trial which is this country's constitutional goal.

380 U.S. at 405. These words should apply in civil trials no less than in criminal trials. The trial court crippled Telelect's cross-examination by ordering that it not be used for one of its principal purposes: to expose witnesses' motive to lie.

Citing other procedural safeguards that are guaranteed to civil litigants by the Fifth Amendment, this Court has noted that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). It is time for this Court to hold that the list of due process safeguards in civil litigation includes the most basic right of all: the right to cross-examine to show bias or interest.

II.

A. THE TENTH CIRCUIT HELD THAT TELELECT PROPERLY PRESERVED FOR APPEAL ITS SECOND QUESTION PRESENTED.

As he did in the Tenth Circuit, plaintiff argues that Telelect did not preserve for appeal its objection to testimony by the linemen that was derived solely from their observations of the reenactment. (Br. in Opp. at 23-26.) While the Tenth Circuit concluded that Telelect did not properly preserve its unfair surprise point, the court of appeals concluded that Telelect *did* properly preserve its objection to

the non-expert linemen giving expert testimony based on the reenactment.[8] The Tenth Circuit held:

> In summary, we conclude that, properly construed, Telelect's objection preserved nothing more than the issue whether lay witnesses were improperly allowed to present expert testimony.

(Pet., App. A, at 13.)[9] Thus, Telelect properly preserved for review its second Question Presented.

B. PLAINTIFF FOCUSES ON ASPECTS OF THE REENACTMENT THAT ARE NOT IN DISPUTE.

Plaintiff argues that the "only purpose of the reenactment was to acquire photographic evidence demonstrating what each witness saw on the day of the accident." (Br. in Opp. at 20.) Telelect has never challenged plaintiff's right to produce photographs that accurately depict the positions of the vehicles at the time of the accident.

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[8] Plaintiff argues that Telelect should have objected to the particular question that elicited the testimony about the live line rising and contacting the underside of the boom. Not so. Telelect already had objected three times to expert testimony by these non-expert linemen, and the objections had been overruled each time. A party is not required to continue asserting a futile objection. *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1542 (11th Cir. 1990); *Stewart v. Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977); *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F.2d 253, 259 (2d Cir. 1956).

[9] Judge Garth, dissenting, believed that Telelect had preserved even the surprise point. (Pet., App. A, at 31.)

The dispute centers on a different aspect of the reenactment: testimony by all three linemen that during the reenactment, the live line "raised up" and contacted the underside of the boom when the neutral line was released. As plaintiff concedes, the linemen did not see whether these events occurred at the time of the accident; their knowledge was derived entirely from the reenactment. (Br. in Opp. at 22, 23.) This is precisely the basis for Telelect's Second Question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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